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The Rule of Law After Globalisation: Is Myth or Reality?

Abstract: The rule of law is unique establishment that had taken place in historical context, as politico-legal edifice of capitalist society. To the extent that any legal system was established in historical context, its form and functioning are cannot be channelled by reflections or professional commitments of lawyers and legal philosophers. The rule of law emerged in certain conditions that we say "classical liberalism", of power allocation where we diversify political power and legal power in the milieu of political society, enunciated as republic or commonwealth. Contrary to earlier forms of legal order, capitalism was unique that its super structure was articulated according to the pivotal role of legal machinery. There was an actual equilibrium between legal and political domains that they moderately matched with public and private dichotomy. After monopoly capitalism, social setting of liberalism was dramatically incurred some major modifications which were firstly dislocation of liberal individual, incited by monopoly capital and secondly, political achievement of the working classes obtained political equality, as drastic consequence of mass society. Hence, the rule of law altered as depoliticsation of democratised mass society, instead of modus vivendi of liberal individuals, which demarcated the rule of law according to welfare society or sozialrechtsstaat. The neo-liberal globalisation after 1980's, republican model of political society faded away that it has been transformed by transnational capital where markets, hierarchies, regionalism and communal settings crosscut inner equilibrium between politics and law. Finally, the newborn articulation of power structure undermined necessary basement of the rule of law.
Keywords: the rule of law, capitalism, liberalism, welfare state, globalisation.

I. Introduction

There are capital problems of philosophy of law that they are philosophical interpretations upon how more justifiable legal order can be established or anyhow philosophical contribution can be performed to the extent to which might remedy to laypersons. In contemporary world, philosophical elucidations and actual legal order are distinct domains that there cannot be any smooth interpenetration between them wherefore the philosopher, apart from her or his achievement on legal theory, criticises legal machinery in order to delineate claims of justice, as outward aspect of legal system, in general. As having been disclosed by Niklas Luhmann with his system theory of law[1], which opened up new frontiers

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[1] Niklas Luhmann, *Law As a Social System*, Trans. by Klaus A. Ziegert, Ed. by Fatima Kastner, Richard Nobles, David Schiff, and Rosamund Ziegert, Introduction by, Richard Nobles and David Schiff, 2004.

for researching legal domain, philosophical criticisms concerned to justice, which must be expounded as outward communication of legal practice. On the contrary, inner communication of the legal system belongs to the legal practitioners who essentially deal with problem of legality, instead of outward value of justice, which belonging to the environment of legal system[2]. Theoretically, we should presume that philosophical criticisms are acquisitions of civilisation, well, but there is not a necessary correlation between philosopher and lawyer, especially after humanist paradigm was abandoned by post-modern usage in humanities. Even though, as having been disclosed in Critical Legal Studies movement, some secondary aspects of legal system might be transformed via activist initiatives or candid devotions of philosophers, core characteristics of the legal system remains intact where substantive premises of law can be concluded according to the liberal ideology of law.

When a legal philosopher is so keen to contribute established legal order, the legal order seems her or him very likely a presumption or embodiment of certain legal idea. On the contrary, legal order in action is a transpersonal social setting that they might be yielded from a series of juxtapositions or contingencies in the social milieu, which cannot be reduced solitary action of any constructive idea or particular will. In this context, the legal system is embodiment of the certain power system of society that it might depend either a monopoly of power, as having been articulated in imperial form of domination or otherwise relied on self-effacing power allocation in commonwealth model of liberal society. Both of them externally constrain human beings in order to drive them to act harmonious conduct with the legal machinery, which cannot be solely extinguished or domesticated by a philosophical elucidation. Despite miscellaneous ideas is elucidated ethical conduct or ethical deliberation among consociates, legal machinery can only be transformed by a strategic action, which concerned to change established power equilibrium by way of piecemeal modification or any drastic compulsions of revolution or counter-revolution. The rule of law is viable if it anyway fits with unassailable constraint of legal domain, which matched with legal power, to the extent that it should not be extinguished by one sided deliberation of political power.

[2] Lyons expresses a theoretical standpoint upon how the rule of law that depended on some number of values for attaining better society with credence about higher values (primordial one is procedural justice or procedural rationality, conforming to Rawlsian approach) must be pursued by everyone in unanimity, as rulers or laypersons. No one can deny higher values, but to safeguard and improve them needs some systemic or structural constraints, instead of responsiveness of government and personal obligation to obey law. Cf., David Lyons, *Ethics and the Rule of Law*, 1979, 194-214.

II. Necessary Properties of the Rule of Law

In contemporary legal philosophy, greater numbers of criticisms are aiming to better the rule of law or to institute it in some other countries (mostly underdeveloped) that they urge political activism to reinforce legal edifice for the sake of minimum standards of human dignity. Whereas the rule of law is an open-textured legal domain, it gradually embraces all proliferation of right-claims, which might be injected into the substantive law and portrayed with some significant components. Apart from its comprehensiveness, respecting to the substantive provisions thereof, the rule of law is basically delineated by way of procedural provisions which offers layperson legal remedies and upholds legal rights and freedoms when she or he is inflicted a violation. A. V. Dicey aligned the three indispensable properties of the rule of law[3] that (1) every due punishment and redress to civil wrongs can only be sentenced when distinct breach of law assigned before ordinary courts and in ordinary legal manner (i. e. due procedure) of established laws of country; (2) every human being, whatever his rank or condition, is subject to the ordinary law of realm and amenable to the jurisdictions of ordinary tribunals; (3) predominance of the legal spirit, which was alleged by Dicey for British institutions, must be necessary characteristic of the political realm that it means legal remedies infuse the constitution via minimizing political discretion. In this context, valid legal rules of the legal system of country may impose minimum or maximum content of the rights for legal persons, as citizens or as human beings, therefore the rule of law highlights procedural rights and remedies under supremacy of judiciary in daily life.

Regarding to the appropriate legal environment, the rule of law is far-reaching social establishment, which ubiquitously concerns legal and non-legal (political and economical) domains of greater society, totally enunciated as "political society". Let we temporarily set aside social conditions of the rule of law and shed light on its necessary components. A legal theorist or a legal philosopher accentuates a series of institutions when participates a debate about how the rule of law works. In this context, an institutional system reveal itself that it partially belongs actual mechanism, related to the constitutional principle of the separation of powers and administration of justice whatsoever and partially to the legal canon, conducting all commitments of the law. Dicey's abovementioned criteria require some indispensable guidelines that all legal debate on the rule of law relied on their ramifications or proliferation with respecting to the expanding scope of the legal domain in the modern society[4].

[3] A. V. Dicey, *Introduction of the Study of the Law of the Constitution*, 1915, 182-199.

[4] I must cite some beneficiary contributions that clarify necessary properties of the rule of law: Lord Bingham, The Rule of Law, *Cambridge Law Journal*, 66 (2007), 67-85; Raz, Joseph, *The Authority of Law: Essays on Law and Morality*,1979, 213-218; Augusto Zimmermann, The Rule of Law as a Culture of Legality: Legal and Extra-Legal Elements for the Realisation of the Rule of Law, *Murdoch University E-Law Journal*, 14 (2007), 10-31;

A. Constitutional provisions relating to the rule of law:

(1) Equality before law: The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation, not detrimental to the principle of equality before law.

(2) Unity and individuality of the legal subject is acknowledged by constitution, insofar as that liberal ideology is taken together or injected into the ideology of law. The law must afford adequate protection of the bill of rights of human individual or the fundamental human rights.

(3) As republican sovereignty postulated, separation of powers differentiates executive, legislative and judicial functions in the milieu that judicial function is decisive to what extent civil litigation at the hand.

(4) Laws must limit, control and guide the exercise of official discretion; therefore, crime-preventing agencies should not be allowed to pervert the law. Executive or administrative officials must reasonably exercise their power in good faith without exceeding the power which conferred them by constitution or any other statute, sub-rule or regulation.

(5) The legislative power must respect rights and liberties of individuals, therefore, all legislative enactments are contingent on the judicial review.

(6) Autonomy, impartiality and accessibility of the judiciary must be guaranteed.

(7) All disputes should be fairly decided in the manner to restrain extemporary decisions, might possibly generating from personal idiosyncrasy of individual judges. As a principle, all cases may be subject to judicial review.

(8) The scope of political power and law enforcement should be delimited by judicial control as restricting discretionary or arbitrary coercion to the private individuals.

(9) The courts and every kind of judicial means must be provided to layperson as easily accessible, without prohibitive cost or inordinate delay when *bona fide* civil disputes emerge, which the parties themselves are unable to resolve.

(10) As *bona fide* principle and *pacta sunt servanda*, compliance of the state to its obligations in international law that the law which whether deriving from treaty or international custom and practice governs the conduct of nations.

(11) As corollary of constitutional and legal culture, people should be guided and ruled by the law and comply it.

Anthony Mason, The Rule of Law and International Economic Transactions, *Globalisation and the Rule of Law*, Ed. by, Spencer Zifcak, 2005, 125; Danilo Zolo, The Rule of Law: A Critical Reappraisal, *The Rule of Law, History, Theory and Criticism*, Ed. by, Pietro Costa and Danilo Zolo, 2007, 18-30.

B. Principles of law, which must fairly be applied all legal grievances

(1) The law must be accessible and so far as possible intelligible, clear, predictable definite and accountable.

(2) Laws should be certain and adequately publicised.

(3) As possible as, laws should be stable.

(4) The rule of law should guarantee a certain generality, openness and clearness of laws.

(5) Apart from some exceptional cases which justify retroactivity, as reasonable departure from principle, all laws should be prospective.

(6) The making of particular legal norms (particular legal orders), which implemented by way of legislation or judicial lawmaking, should be guided by open, stable, clear, and general rules or legal principles.

(7) Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of political or administrative discretion.

(8) Adjudicative procedures, which backed by the state, should be fair.

(9) As justification of court decision, the principles of justice and sense of justice *must* be observed.

(10) Decisions of courts should rely on reasonableness and becoming justifiable, with respect to the principles.

The rule of law is a subspecies of the legally ordered society that it purports not only to use norms as a means of government, but also governance by legal rules must be entirely predominant in the legally legitimised political society. Therefore, the rule of law not only concerned to legal domain, but also that legal spirit of law should permeate political domain in the manner how political legitimisation takes place by way of legality. In this context, albeit necessarily pure political conduct of state, as observed in retribution in international law or emergency condition (previously stipulated by law), all political and administrative discretions are diminished and curbed by law. As having been implied by Dicey, the rule of law is, by and large, abnegation of political discretion and legal check to the administrative discretion[5]. The rule of law is zenith of the separation of powers in a sovereign state in the political society context that it is viable when the power is duly implemented by means of division between participated political centres, peers and in any extent political participation. Despite the fact that fundamentals of the rule of law dimly established in social conflict between political claimants, John Locke, British philosopher, maturely traced according to the

[5] Dicey (note 3), 185-188.

political model of liberal society and of its actual or taken for granted political participation[6]. According to the Lockean story about how political society established, human beings enact a contract to protect their natural liberties, which enumerated as life liberty and property. Therefore nexus of the social contract was right to punish violation, when might be inflicted to the natural liberties that it embodied to establishment of judiciary and civil (penal) laws thereof. As regards, the rule of law yielded from a sum total of political participation, which a matter of fact development in itself, it should not be deemed likely ideal stage of human progress, regardless to its socio-political environment. On the contrary, it is dependent on constitutional system that it might only be safeguarded by duly political equilibrium, which carried on by structural positioning of participants in the *status quo* of liberal society.

III. Some Cursory Remarks on the Rule of Law Establishment

The rule of law was established to some extent in the viable social milieu, but it takes place in various forms according to the social conditions, political experiences and legal culture of any given society. First of all, we must typically regard liberal rule of law, to that I prefer to say "the procedural rule of law", which coincided with classical liberalism in the normal course of capitalist accumulation and social formation, as observed in the histories of the Great Britain and United States of America. The other model is the rule of law in the milieu of welfare state, that is I say "the substantive rule of law", that it discloses German *sozialrechtsstaat* and overlaps not only welfare state policies of the era of monopoly capitalism, but also had stemmed from regulatory state in state-sponsored development of capitalism, as observed in 19th century of Imperial Germany[7]. In this context, both of the two variants of the rule of law are in close relationship with capitalism and modern society.

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[6] John Locke, *Two Treatises of Civil Government*, Introduction by, William S. Carpenter, 1966, 154-164

[7] I expressed my idea in some recent publications: Mehmet Tevfik Ozcan, Rule of Law: A Modus Vivendı or an Imaginary Relationship, *Annales de la Faculté de Droit d'Istanbul*, Vol. 38 (2006), 49-59; Mehmet Tevfik Ozcan, *Modern Toplum ve Hukuk Devleti* (The Rule of Law and Modern Society), 2008; Mehmet Tevfik Ozcan, Capitalism and the Rule of Law: The Three Stages of Legal Order in Modern Society (Abstract), *IVR 24th World Congress, Global Harmony and Rule of Law September 15-20, 2009*, Vol. I, 177-182. Mehmet Tevfik Ozcan, Pravoe Pravlenie: Çeloveçeskaya Dobrodatal (Trans by, B. K. Shreibera), *Vestnik Çelyabinskova Gosudarstvennove Universiteta (Filosofiya Sotsiologiya, Kulturologiya)*, Vol. 18 (2009), 40-46 My point of view might be considered as similar to the Tamanaha's distinction between "formal" and "substantive" theories of the rule of law, but he highlighted theoretical elucidations on the matter, whereas I apprehend the rule of law as structural inclination which outcome of capitalist social formation. Cf., Brian Z. Tamanaha, *On the Rule of Law*, 2004. At the first sight, in Craig and Zimmermann (see note 4) separately specify the differentiation between formal and substantive conceptions of the rule of law. Their formal rule of law seems parallel with my procedural rule of law consideration, whereas they delve into ethical content upon how expounded the substantive conception. Thus, their substantive conception of the rule of law" is totally dissimilar my point of view, because they enunciate an ethical debate, whereas my concern is plainly relevant only to substantive law. I consider that both of the two conceptions are enunciation of structural component of political society, but cannot be solitarily reduced ethical conduct of legal professionals or legal domain which is imbued with ethical evaluation such as. Cf., Paul Craig, Formal and Substantive Conceptions of the Rule of Law: An Analytical

The liberal (procedural) rule of law is backbone of the rule of law conception that it embraces personal freedom in the content what political liberalism alleges. Overwhelming majority of legal scholars in modern times when plainly enunciate "the law", they overtly or tacitly delve into legally ordered society whatsoever delineate the rule of law. Despite some miscellaneous pros or cons arguments on the rule of law[8], there is *vis-à-vis* paralleling between the rule of law and ingenious ordering of any capitalist society that it set forth individual freedom, non-existence of political paternalism and of to the extent to which legitimate governance through individual wills. Among others, Immanuel Kant brilliantly compartmentalised the two distinct domains of the ethics and law that the former is embodiment of internal legislation of the moral obligation, whereas the latter denotes the domain of external legislation of legal right, which grounded on presumed compromise of plurality, sum total of the personal wills[9]. The point of view cited is repugnant to the paternalist politics and its legal constellation in agro-literate society, which faded away from early beginnings of capitalism. Legal domain of any agro-literate society was composed of performative acts of sovereign which interpreted and systematised in any extent canonised by labour of clergy[10], or at least, as having been visible in the middle ages, preached by joint action of the prince and papal government. As Waldron pointed, the rule of law was established after a political upside down that godly governed society had been replaced by the society governing with human laws[11]. When economic infra-structure of feudal society was gradually fading away onwards 13th century, money economy wielded its influence onto sovereign bodies in the manner how expanding financial shortages embittered the relationships between kings and their vassals in levying more burdensome taxes. Therefore, taxation conflict between Norman kings and noble class before Magna Carta of 1215

Framework, *Public Law* (1997), 467-487. At the outset, I borrowed the conception of Ernst Rudolf Huber, German lawyer, by way of an article, translated to Turkish where he considered the substantive conception as an outcome of the social change which took place in the base structure of society, named as industrial society, which conducted to establishment of welfare state. See, Ernst Rudolf Huber, Modern Endustri Toplumunda Hukuk Devleti ve Sosyal Devlet (Trans by, Tugrul Ansay), *Ankara Universitesi Hukuk Fakultesi Dergisi*, 27 (1970), 27-51 (Original publication: E. R. Huber, *Nationalstaat und Verfassungsstaat, Studien zur Geschichte der Modernen Staatsidee*, 1965, 249-272).

[8] For example see, Martin Kryger, Marxism and the Rule of Law: Reflections after the Collapse of Communism, *Law and Social Inquiry*, 15 (1990), 633-663; Richard Abel, Capitalism and the Rule of Law: Precondition or Contradiction, *Law and Social Inquiry*, 15 (1990), pp. 685-697.

[9] Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence*, Trans. by, W.Hastie, 1887, 14, 20-23, 46. Despite, Puchta was closer to the Hegelian philosophy and German romanticism, he is very parallel to the Kantian point of view when demarcate the legal right and moral obligation. Cf., G. F., Puchta, Outlines of Jurisprudence, as the Science of Right, a Juristic Encyclopaedia, *Outlines of The Science of Jurisprudence*, Ed. and Trans by, W. Hastie, 1887, 1-134.

[10] See, Jan, Assman, *Kulturel Bellek, Eski Yuksek Kulturlerde Yazi, Hatirlama ve Politik Kimlik*, Trans. by, Ayse Tekin, 2001 (Original: *Die Kulturelle Gedachnis, Schrift, Erinnerung und Politische in früen Hochkulturen*, 1997)..

[11] Jeremy Waldron, *The Law*, 1990, 39, 45.

exponentially prolonged after the charter. In this milieu, it developed on the one hand separation of powers between kings and so named the national councils[12], on the other hand sovereignty furthered as national unification under the guidance of charters and laws. Although, capitalist mode of production might be dated to emergence of yeoman farmers of Tudor times[13], its germ and social milieu took place after Magna Carta. As far as my information availed, "the rule of law" term was uttered the first time by Sir Edward Coke, on 1603 while James VI the King of Scotland was marching to London from Scotland for accession to the British throne as James I[14], in the meantime, capitalist society, as its social environment and legal experimentation, had already became matured.

Regarding to the common law, Dicey highlights judge made law and unwritten constitution as ideal of the rule of law that it corresponds with minimal discretion of legislature which might be harmful to the juristic power and legal rulings[15]. Furthermore, the British legal experience also underlines balanced roles of legislation and judge-made law in a way how determining position of non-written law. Albeit some revolutionary renovations took place, as Justice Holmes pointed, any legal system (in capitalist societies, too) is institutionalised within its surrounding peculiarities, which cannot be reduced to an embodiment of a single ordering idea or an incessant tradition[16]. Therefore, common law system was a sum total of miscellaneous legal experiences, which accumulated in the course of history, hereafter its formal and substantive components matched in an evolutionary process, very likely to the Darwinian struggle for survival. British liberalism and the rule of law began with Christian-blended natural law after Magna Carta and reached legal positivism nineteenth century onwards. As Holt pointed, Magna Carta of 1215 (also reissuing on 1217 and 1237 Parva Carta) engendered not only granting freedom, but also a profound tradition of legislation thereof by way of its approval by the 56 local parliaments on 1237[17]. Holt also testifies that Magna Carta incited adjudication with juries, which was composed of peers, according to the *lex terrae*. Therefore, *lex terrae* metamorphosed to "the due process of law", after revisions- implemented by legislation between1331-1368[18].

[12] Shepard Assman Morgan, *The History of Parliamentary Taxation in England*, 1911.
[13] Cf., E. J. Hobsbawm, *Industry and Empire*, 1990, 42-46.
[14] Jim Corkery, The Rule of Law, *The National Eagle* (November 2000), 3-7.
[15] Dicey (note 3), 192.
[16] O. W. Holmes *The Common Law*, 1882, 1-37.
[17] J. C. Holt, Ancient Constitution in Medieval England, *The Roots of Liberty*, Ed. By, Ellis Sandoz, 1993, 32-74.
[18] Holt (See note 17), 62.

After Magna Carta, dominant consideration on the British law was generally spoken as common law that it was all embracing for British people, which expressed as *consuetude*[19]. In this milieu, *lex terrae* was backbone of legal system, therefore all legal *acquis* was unaffectedly constellation of unwritten law, inasmuch as Edward I (who named as English Justinian) and succeeding kings venerated it in their legislative policy. Whereas the period clarified significance of legislation, very likely that it presumed legislation as restated utterance of *jus non scripta*[20]. I am not sure, but it might be said that consideration of time was so parallel to the opinion which uttered by Saint Thomas Aquinas in Question 90 of *Summa Theologica*[21]. Indeed, common law was considered as implementation of practical reason, therefore legislative actions were human laws in Saint Thomas's point of view, which inspired by natural law inasmuch as inspired by divine providence. At the end of the 15th century, Sir John Fortescue, the well-known jurist from Lancastrian house, vociferously posited natural law doctrine to maintain law-based governance of king, councils and the peers[22]. Fortescue asserted that kingship was initially usurpation, but it might be legitimised by means of recourse to councils and governance through legal rules which deduced from the law of nature. The corollary of this idea is that the statutes, which might be proclaimed by a prince or a king, should be enacted by Parliament, as demonstrating conformity to the common law, in spite of solitary discretion or arbitrary commands of despotism[23].

The fact that British legal history or the history of the rule of law does not display a smooth path of development, therefore we must especially regard to the political convulsions and fluctuations. Thus, the Tudor and Stuart eras urged dissimilar legal considerations and debates to the extent that separation of power and embodiment of general will whatsoever declined. Inasmuch as Elizabethan period visibly demonstrated, dominant legal opinion shifted to the ancient theories of Cicero and Stoicism that, to a greater extent, they are syncretistic fusing of ethical theories with religious dogma, instead of elucidation of the theoretical grounds of the separation of powers[24]. Meanwhile, Magna Carta remained intact, but very tiny referred and that it considered as *statuta antiqua*. The exampled book of the period was *Doctor and Student* of Christopher Saint German that it was very likely to the revival of Saint Augustine, which interpreted the law according to the conjectural hierarchy of

[19] Charles Howard McIlwain, Magna Carta and Common Law, *Magna Carta Commemoration Essays*, Ed. by, Henry Elliot Malden, 1917, 122-179.
[20] McIlwain (See note 19) 149.
[21] See, Thomas Aqunias *Treatise on Law, Summa Theologica, Questions 90-97)* Introduction, Stanley Parry., (w. date)..
[22] John Fortescue, *The Governance of England*, Ed. by, Charles Plummer 1926.
[23] Fortescue, *De Laudibus Legum Angliae* Introduction by, A. Amos, 1825, 41.
[24] Christopher W. Brooks, The Place of Magna Carta and the Ancient Constitution in Sixteenth Century English Legal Thought, *The Roots of Liberty*, Ed. by, Ellis Sandoz, 1993, 75-114.

sources, regardless to actual or taken for granted collision between monarchical power and judiciary[25]. In this milieu, Fortescue and Coke were frequently cited as adversary opinions against dominant legal thought. It must be added that ostensible contribution of the time was certain furtherance in implementing equality before law, as direct or indirect acquisition to advance the rule of law.

Beforehand the Tudor era, British experience eventually matched with limitation of sovereign power of the monarch and expanding role of the legal domain that it weakened political discretion in favour of legal authorisation. Although it was not first example of limitation of monarchical political discretion, all pre-modern sovereign political bodies had been urging legal recourse in order to entrench transpersonal sovereignty by way of canonised laws and regulations, but they were lacking in power allocation which sharing power with judiciary. Prior to the Tudor dynasty, the separation of powers, under the gist of feudal society, stiffened by way of councils, which checked political discretion of the king in two ways, either expansion of judicial function or to delimit legislative policy. In the middle Ages, the councils of the Norman rule in Britain, which named as *parliament* or under any other wordings, such as, *curia, concilium ordinarium, concilium privatum, magnum concilium, commune concilium*, were of judicial character, unfamiliar with political role of the modern parliaments. At the same time, albeit some exceptions, statutory legislation was so seldom, even though it had been known since King Aethelberth of sixth Century[26]. Wherefore a legislative document sporadically emanated, it was not considered as declaration of a novel substantive law provision in order to entrench existing legal corpus, moreover it was embodied as anew declaration of customary law or refinement of existing law as worded precisely or annulling unreasonable provisions. In this milieu, lawyers and parliaments alleged that customary law equated with common reason which couched as the will of society.

Parliamentary legislation fully injected British realm during the Tudor era while the parliament failed its judicial role and became legislator[27]. Concurrently, judiciary altered in favour of proliferation of the courts, wherefore the Star Chamber was most prominent among others. In the whirlpool alteration of British politics, legislation and common law clashed to a greater extent, especially during Stuart time with climax of the absolutist tendencies of the kings. The common law and unwritten constitution was traditionally harmonious with

[25] (Christopher Saint German), *Doctor and Student*, 1886.
[26] Charles Howard Mcllwain, *The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries between Legislation and Adjudication in England*, 1910, 14, 42-47.
[27] Ilwain (See note 19) 131.

separation of powers which anchored in indispensable pre-eminence of the judiciary, even though the king was officially sovereign. It is evident that, in this milieu, legislation has minor importance and accomplished to any extent amenable the judge-made law. King James I of Stuart raised claims for legislation with believing inaptitude of traditional legal canon of the common law. Therefore, he revisited hereditary rights of the sovereign king that he regarded the kingdom was divine gift, as disclosed in his admonitions, titled as *Basilikon Doron*[28]. James I was so reserved king to lawyers and common law tradition, therefore he claimed expediency of the civil law education in universities and codification of common law with inspiring Catholicism and legal traditions of France, Spain and Scotland[29]. In this context, Coke, Selden and Hedley, who were pre-eminent jurists of the age, raised their objections that they hinged on national character of common law and its avowed certainty, with respecting to the Fortescue's ideas on natural law and governance through law.

The legal debate of Stuart era was not only impinging on the legal system by way of quarrelsome pretensions, but also stretched the debate between absolutism and constitutionalism, ascendancy of papal authority and Puritanism (or Presbyterianism). In this milieu, the debate for *lunnage* and *poundage* taxes coalesced with demand for parliamentary power and respect to Magna Carta, as the king was admonished by the Petition of Rights on 1628, and therefore the civil war prompted parliamentary sovereignty of the Long Parliament and superimposition of legislation. Subsequently, despite nobility had cogently aspired sovereignty of the king, they eventually swayed to acclaim the rights and liberties thereby amended in Magna Carta and used to be empowered. The line of debate signalled national compromise of restoration of 1688, as depicted by Locke in his *Second Treatise*, where political society was redefined according to the commonwealth which characterised by central role of judiciary. Even though Locke did not utter a juristic language, he defined civil society to the extent that it should safeguard natural rights (i. e. life, liberty and property), with moderate legislation, strictly considered as civil laws[30]. It is evident that so called "civil laws" specifically aimed to prohibit violation of natural rights; therefore, respecting to classical form of the common law, while substantive law of liberal individual remained, as ordered by judge-made common law. Apart from criticisms on liberal purview or about its strict reliance to property owners, Locke mutely synthesised historical influx of the common law.

[28] James I, *Basilikon Doron*, 1887 (1599).
[29] Paul Christianson, Ancient Constitutions in the Age of Sir Edward Coke and John Selden, *The Roots of Liberty*, Ed. by, Ellis Sandoz, 1992, 118-128.
[30] See Locke, (note 6.) 159-164, 179-182.

Despite Lockean ideas on political society which they were articulated in a pseudo-historic frame, his ideas represented the sum total of the historical accumulation of the ongoing British political and legal experimentation which inaugurated in the political conflict between king and peers. It reached surpassing social role of bourgeoisie, which took part as burgeoning agent of the political opposition. On the one hand, bourgeoisie rigorously acknowledged inception of parliamentary legislation, on the other hand it made incentive to the maturation of the separation of powers. Therefore, political and legal domains reached matter-of-fact equilibrium where "natural" order summarized in such an order, whereby represented by national trait of the British society. As reflected in the ideas of David Hume, state and law is contingent, but inalienable components of the civic life, which conducted reliable compromise between power and liberty. In his consideration upon "politics may be reduced to a science", he pointed well balanced government which aroused in historical experience of politics, moderation and assessment on British institutions[31]. By the same token, Adam Smith designated the law for protection of individual from injuries, which might inflict his personality, reputation and property, in his "natural" jurisprudence[32]. Concurrently, albeit any constructive idea was absent, for Adam Ferguson, the civil society is a consequence that it developed by historical advancement, whatsoever proven by scientific research[33]. Those historical, scientific or pseudo-scientific ideas, which emanated from various authors of eighteenth century, conservatism of the common law swayed to a utilitarian use of historical past, as "forensic history"[34]. Consequentially, the idea of governance, which was well-balanced with freedom, remained central theme that the law is prerequisite of freedom, more correctly "private property" by which axiom of political participation set forth male person property owner, with setting apart disrespected propertyless bystanders.

Regarding to the necessary properties of the rule of law, as abovementioned, they highlight that the two essential powers, which titled as legislative and executive (in which we deem cabinet, presidential discretion and administration), should be curbed by the law. The rule of law assumes not only every individual's and government's allegiance to the law, but also conditions statutes and other legislative acts' coherence with the law, in spite of legislator (i. e. parliament) is superior. Corollary of this fact was that all statutes became annullable by judiciary whatsoever all laws might be challenged and potentially and actually repealed by the court, according to the process due to them. Regarding to the parliament was highest court as

[31] David Hume, *Essays, Moral, Political and Literary*, Ed. by, T. H. Green and T. H. Grose, Vol. I, 1898, 97.
[32] Adam Smith *Lectures On Jurisprudence*, Ed. by R. L. Meek, D. D. Raphael, P. G. Stein, 1978, 8, 13. 401
[33] Adam Ferguson *An Essay on the History of Civil Society*, 1789.
[34] John Philip Reid, The Jurisprudence of Liberty, *The Roots of Liberty*, Ed. by, Ellis Sandoz, 1992, 210.

before Tudorian era, legislative acts had been exclusively controlled before the judiciary, even anterior to their proclamation and dissemination. Otherwise a complete statute or its some provisions theoretically might not be feasible respecting to the case at stake; the legal provision would be therefore dismissed. Thus, Dr. Bonham case on 1610, in England, deserves special attention, by which Court of Common Pleas annulled a parliamentary statute that it already granted Royal College of Physicians to give licence to physicians. Under the headship of Sir Coke, the court declared that any act of the parliament is void when violate a common right or reason, assumed in the common law, because the act, in practice, granted the college members, which composed of physicians, to judge their own case[35]. Afterwards, Dr. Bonham case was eventually cited in some another cases in Great Britain and America, such as Commonality of London *v.* Woods on 1701, Trevett *v.* Weeden on 1786 in Rhode Island Superior Court or Marbury *v.* Madison on 1803 in United States. Even though, sovereign power of legislature became constitutional principle after Long Parliament, Blackstone's tenth rule posited that a legislative act is void when commands absurdity, impracticability and unreasonable consequences[36].

Now, let us briefly glimpse at the rule of law experiences of some other countries that they disclose some other national characteristics. First of all, the rule of law solely practicable under national unification together with due separation of powers, which makes British example evident, because the first country can coped with the problem at earliest date. Despite, I found her ideas uncompromising in general, Blandine Kriegel vehemently expressed that main prerequisite for the rule of law is centralisation of governmental system through law and judiciary, as England zenith of it, earlier than two and half centuries from other European states[37]. Therefore, Continental European and other countries remarkably lagged in comparison with British example. As a matter of fact, American colonies before 1776 Revolution were normally adhering common law even where they were absent from equal representation in the parliament. Moreover, we can cite some overt provisions about how extension of British laws to colonies (including American colonies), especially the statutes, enacted by Charles II and William III (William of Orange)[38]. As interpreted by Coxe, the statute, which legislated by William III, did not overtly proclaim that the colonial laws might be repugnant to acts of British Parliament, they were not null and void. In this case,

[35] Brinton Coxe *An Essay on Judicial Power and Unconstitutional Legislation*, 1893, 171. In the British legal history, it is worthwhile to research Taltarum's Case in the time of Edward IV (on 1472), where De Donis statute of Edward I, 1285 was repelled by judicial ruling. See, McIlwain, (note 26) 267.
[36] William Blackstone *Commentaries on the Laws of England*, Vol. I 1893, 90-91.
[37] Blandine Kriegel, *The State and the Rule of Law*, Trans. by Marc A. LePain and Jeffrey C. Cohen, 1995, 73.
[38] Coxe (see note 35.) 181.

such acts of British Parliament must not be considered that they were extended to the colony. By the same token, 18th Century British forensic history aforementioned, which entrenched common law in anew elucidation to rely on a taken for granted national breed, it extended the utterance of "freeborn Englishmen" and Bill of Rights to American colonies[39]. Lastly, it must be added that Stamp Act debate onwards 1765 resurrected a controversy on equality between Englishmen and colonial born Americans.

Between American Revolution on 1776 and promulgation of United States Constitution on 1787, judiciaries of American states was familiar to the judicial review for states' legislation, such as Trevett *v.* Weeden on 1786 in Rhode Island[40]. To a great extent The United States Constitution imbued with common law doctrine and all acquisitions of the Bill of Rights where in the Fifth Amendment trial by jury in the indictment of treason as due process of law and substantive due process in every kind of litigation in the Fourteenth Amendment on 1868, whereby civil or criminal cases specifically cited. In this milieu, American constitutionalism was inherently relying on the liberal (procedural) rule of law, which congruent with prevalent small property ownership and casting out political paternalism even where British-like peerage was absent. Fourteenth amendment was outcome of the post Civil War developments. The two groups of events must be specifically cited[41] that firstly slaughterhouse cases in Louisiana, that they emerged from state legislature's grants privileges in favour of some slaughterhouse owners, that is violation on the freedom of trade. And secondly, even though, the Thirteenth amendment abolished slavery, a great number of employers were reluctant to make labour contract with black labourers. The question for black people was tried to be mitigated by way of the two super-statutes which titled as *Civil Rights Act* and *Freedman Bureau Bill*, but failed. The two cases induce legislation of the Fourteenth Amendment that it brought substantive due process, whatsoever main pillar of the American rule of law in order to uphold rights and liberties of liberal individual.

British and United States establishment of the rule of law is in close affinity with political liberalism which hinged on a social substratum of competitive capitalism, as Marxian approach dichotomised as base and super-structure. Whereas the sum total of legal experience began feudal time, the base of capitalism steered nexus of separation of powers under national unification through law and judiciary. Subsequently, bourgeoisie, pivotal dynamic of

[39] Reid (see note 34.) 288.
[40] Coxe (see note 35.) 220-221.
[41] Cf., Edward Keynes, *Life, Liberty and Privacy: Toward a Jurisprudence of Substantive Due Process*, 1996, 31. Philip Selznick, American Society and the Rule of Law, *Syracuse Journal of International Law and Commerce*, 33 (2005), 29-39. Walton H. Hamilton, The Path of Due Process of Law, *The Constitution Reconsidered*, Ed. by, Conyers Read, 1938, 167-190.

capitalist development, entrenched and advanced the legacy of the late feudalism. The liberal rule of law formed a legal legitimisation unto politics, which backed by equality before law and safeguarded by augmentation of political participation within outer limits of overall liberalism, but to any extent it did not stipulate democracy. As regards Tawney's point of view on liberal society, liberal government resembles a joint-stock company that wills of its shareholders (i. e., peers, small property owners, tradesmen and petty-sized industrialists) were limited with the principles of the common law and approved by "common sense" of propertied classes in politics[42]. Let we compare the other Western societies, especially France and Germany, such societies were in a remarkable lag in capitalist development, especially regarding to the industrial revolution where political limitation of state could not be achieved by diffusing power of bourgeoisie. However, at the threshold of the nineteenth century, their social structure was seriously demolished by side effects of the capitalist world system that they busied with either revolutionary inclinations or to accomplish national union (for Germany). Therefore, they were pushed an opposite path, nevertheless they debated on *der rechtsstaat* or *l'état du droit* which aimed to re-establish state under the pivotal role of law in order to cope with national unification problem or anew constitutional drafts, but failed because the rule of law cannot be achieved by legislative schemes and codification. However, those are viable instruments, crucial in their political agenda, but, for the rule of law, they needed national unification by means of autonomous judiciary and depoliticsation, with its superimposition instead. In this milieu the intellectuals expressed very remarkable ideas on law and the rule of law, as Pietro Costa admirably portrayed[43], that it might be superfluous to reiterate.

Initial formation of the rule of law flourished in the web of liberalism that it conformed two different groups of facts. On the one hand it corresponded with *laissez faire* principles in economy and politics, such as right of property, freedom of contract, gold standard of currency, night watchman state and minimal or no regulation in economy. On the other hand, it coped with political legitimacy problem in the secularised society, which was accompanying with so-called contractual ostentation of liberal individual, after the doom of the status society. But the liberal society, as such, entailed a crisis to the extent that it was indifferent to mass impoverishment of working class and emerging rivalry between capitalist states for re-distribution world geography. The liberal core of the procedural rule of law could no longer maintain under those twofold pressures whatsoever. Firstly, with due attention to

[42] R. H. Tawney, *Religion and the Rise of Capitalism*, 1936, 184.
[43] Pietro Costa, The Rule of Law: A Historical Introduction, *The Rule of Law, History, Theory and Criticism*, Ed. by, Pietro Costa and Danilo Zolo, 2007, 73-149.

the prevalent legal policy, which reconcilable with the liberal rule of law, it depended on minimal legislation and regulation, as maintained until Roman Catholic Relief Act in England, promulgated on 1829[44]. The legislative quiescence and *codiphobia* were inherent policy concerns of classical liberalism, even when some liberals still tried to maintain at the end of the nineteenth century[45] or today with regard to English or American reluctance for private law codification. However, very elaborately designed liberal governance in England could not remedy all harmful social consequences of capitalism, which manifested themselves as distrust with working class pauperism, unrest and criminalisation; the ready-made remedy was to reinforce penal system and penitentiary measures whatever compelled to pass legislative acts. Considerably at early date, prior to the industrial revolution, George I promulgated Waltham Black Act on 1723 which aimed to punish efficiently the crimes to property and person, but failed because of its Draconian character and severity[46]. Apart from failure of the act aforesaid, working class disgust pervaded all industrial regions and cities, especially after Paterloo massacre on 1819, therefore such claims coupled with demand for legislation and universal suffrage[47].

The fact that liberalism was generally adversary to parliamentary legislation and codification, but Jeremy Bentham, as a radical (Whig) liberal, rigorously became exponent of parliamentary legislation in order to refine liberal order from remnants of paternalism. He defended legislation and civil law codification under guidance of four principles, namely as "subsistence", "abundance", "equality" and "security", with prospecting to adjust society complete vision of liberalism[48]. Meanwhile, British government was not enthusiastic for legislation under the guidance of Burke's conservatism and that it feared penetration of revolutionary campaign and republicanism, which emanated from the Napoleonic Wars and from petit bourgeoisie, in the milieu of vulnerable British *status quo*. Under the Benthamite influence, English government prohibited working class organisations by means of 1824 and 1825 Combination Acts, as corollary of radical liberalism. Aftermath, the British legislative policy was totally altered that the Whig government embarked upon extensive legislation after 1830. The political unrest channelled more legitimated political campaigns after People's Charter on 1832 and New-Tories victory, therefore the nexus of politico-legal system swayed

[44] A. V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century*, 1905, 11.
[45] Lindsay, Farmer, Reconstructing the English Codification Debate: The Criminal Commissioners 1833-45, *Law and History Review*, 18 (2000), 397-426. Spencer still was adversary to extended legislation at the end of the 19th century. See, Herbert Spencer, *The Man Versus The State*, 1885, p. 18, 34, 44, 48.
[46] E. P. Thompson, *Whigs and Hunters*, 1990.
[47] E. P. Thompson, *The Making of the English Working Class*, New York, 1966.
[48] Jeremy Bentham, *Theory of Legislation*, Trans. by, Etienne Dumont, 1864, p. 93.

from radical liberalism to the approval of overall public opinion and "collectivism". The new political principles, as Dicey expressed, are "extension of the idea of protection", "the restriction on freedom of contract", "the preference for collective as contrasted with individual action, especially in the matter of bargaining" and "the equalisation of advantages among individuals possessed of unequal means for their attainment"[49].

The change in British politics was a principal sway from the liberal rule of law to the substantive rule of law, as traditionally named "welfare state", therefore judicial lawmaking was incrementally replaced by extensive legislation. Inasmuch as new *status quo* was irreconcilable with liberal night watchman state, the governmental system assumed new task to mitigate working class grievance and to satisfy their demand for remuneration. In this milieu, new laws in favour of lower class people were injected into the system, that is, primarily from 1840 onwards[50] which focused on ten hours working day (1847), to prevent food adulteration (1860), to regulate food and drug sales (1899), land law (1860 and 1881), free education to all countrymen (1891), housing for working class families (1851 and 1900), public health (1848 and 1875), subsidising poorer people (1894) etc. Albeit, Dicey's term was "collectivism" for the new era, which roughly referred to social justice, the development reflected a remarkable alteration in the content of the rule of law that it reflected new political equilibrium, as radical change in essential character of the ongoing political attitude. First of all, the governmental system was obliged to reconcile working class whatsoever the outcome of political strife under the upsurge of labourer's class-consciousness. The other was drastic change in the functioning of the law that it swayed on the one hand from protection of liberal individual to class conciliation and on the other hand from established formal or procedural justice to the regulation, pragmatism and importance of parliamentary legislation. Thirdly, the change accompanied democratisation of political life to the extent that *polyarchy* expanded at any rate, which was consequence of naturalisation of subaltern social strata. Despite there was some punctuations, which might exert counter effect on democratisation, the era of welfare state or the substantive rule of law is very likely parallel with expansion of *polyarchy*, especially in the second half of the 20th century[51].

In the legal domain, we must point that legal positivism was congruent with regulatory state where attributed a critical role to the law which metamorphosed it from to safeguard free-born individual to maintain *status quo* by means of commands of sovereign[52], anyhow

[49] Dicey, (see note 44.) 258.
[50] Dicey, (see note 44.) 261.
[51] Robert A. Dahl, *Democracy and Its Critics*, 1989, 225-244.
[52] John Austin, *Lectures on Jurisprudence*, Vol. I., Ed. by, Robert Campbell, 1873, 88.

interplayed with the idea of parliamentary sovereignty. We must add that, as Bentham devoted himself for expounding on the control society and *panopticon*, which relied on an idea about malleability of human society. Notwithstanding this extensive change, the liberal nexus of the law remained, but was veiled by a regulatory wrap. It is worthwhile to ask why the grounds of the aforesaid shift how any longer depending on a radical change of capitalist mode of production under excessively socialised labour process or a domesticated liberal ideology. Concurrent with working class political uprising, the society became more resembled as the mass society in spite of its official conception was society of individuals, so distorted image in comparison with actual condition. As expounded by Gustave le Bon at the end of the nineteenth century, mass society cannot be understood by philosophical explanations or ideological daydreams of liberalism, nonetheless it can be apprehended by a science (namely, by sociology) and might be governed by sophisticated means of control[53]. As Foucault specifically delved into inner relationship between discipline and *panopticon* in correction house and army[54], it was initially embarked upon in employment and workhouse, reached its zenith in modern factory system[55]. In this context, I must lastly express that the individual was gradually replaced by corporate personality in the capitalist mode of production and social setting of human individual, which yielded to evaporation of "private sphere" of the liberal society and solely survived in legal definition.

When transformation of capitalist society unfolded itself as mass society, the change was unintentional that capital accumulation process yielded intensification and centralisation capital and sequentially proliferated mass of propertyless labourers and unemployed population[56]. The transformation, such as, was remarkable at the end of nineteenth century which reached an unprecedented stage of capitalist society, whatsoever monopoly capitalism was widespread. In this milieu, the exponents of free competition in United Kingdom and United States, eventually grudged this "unwilling" consequence, but realistically adjusted themselves, because monopolistic or state-sponsored competition in the global sphere coerced them[57]. Meanwhile, competition of big business breezed through competition of sovereign states, because interests of companies were already identical with dominant politics of their

[53] Gustave Le Bon, *The Crowd: A Study of the Popular Mind*, 1896.
[54] Michel Foucault, *Discipline and Punish*, Trans. By, Alan Sheridan, 1995.
[55] Dario Melossi, Institutions of Social Control and Capitalist Organization of Work, *Capitalism and the Rule of Law*, Ed. by, Bob Fine, *et al.,* 1979, 90-99.
[56] Karl Marx, *Capital*, Vol. I, Trans. by, Samuel Moore and Edward Aveling, 1909, 671.
[57] Richard Hofstadter, What Happened to the Antitrust Movement, *The Political Economy of the Sherman Act: The First One Hundred Years*, Ed by., Thomas Sullivan, 1991, 20-31; Ernst Von Halle, *Industrial Combinations and Coalitions in The United States*, 1900; Hermann Levy, *Monopoly and Competition*, 2001; V. I. Lenin, *Imperialism: The Highest Stage of Capitalism: A Popular Outline*, 1939; George G. Stigler, The Origin of Sherman Act, *The Political Economy of the Sherman Act: The First One Hundred Years*, 32-39.

homeland countries, which were paving the road of the world war. Consequently, the all liberal canon on economy, politics and finance dramatically faded away wherever government regulation, protectionism and privileged custom tariffs became prevalent[58].

I hope that the reader can remind the abovementioned opinion, which pointed inner relationship between the rule of law and national unification. In the last quarter of nineteenth century, capitalist countries rigorously reinvented nationality, whereof working classes were naturalised for not only for gratification of their universal suffrage claims, but also they seemed prospective soldiers of the future combats with rival states in order to control markets and colonies, especially after success of Napoléon Bonaparte's national army displayed. Most important aspect of the development was German state-mandated capitalism and its inner relations with nation-building process. After the Napoléonic wars, German unification was accomplished according to a plan, which proposed the first time by Friedrich List on 1822[59] where the author expounded his capitalist development plan under the headlight of national economy consideration. Despite its history took place in same fluctuations, German capitalism developed under the mastering of government that, contrary to the British capitalism, Imperial Germany allotted and mobilised all national prowess. Government husbanding capitalism of Germany consciously harnessed all viable means where state mandated monopoly enterprises were crucial, anyhow was reproached from liberal purview[60]. Therefore, German capitalism was launched in conscious manner how coupled nation building and economic development in a manner to recourse nationality, culture, natural sciences, universities and theoretical oddity in legal theories. The fact that a liberal frankly or equivocally expresses her or his remorse to the state monopolies or every kind of monopolisation in market, but Imperial Germany plainly embarked on cartelisation in strategic sectors and that overtly established government-made *kartelgesetz*[61]. I must lastly point that Imperial Germany virtually quitted the hostility to the labourers, which was contrary to the traditional attitude of capitalist governments. Therefore, as having been concluded a resolution between Prince Bismarck and famous "socialist" leader Ferdinand Lassalle, after negotiation between 1863 and 1864, government unilaterally granted universal suffrage and welfare measures to all German countrymen, such as, pensions, working hours,

[58] John A. Hobson, *International Trade: An Application of Economic Theory*, 2003, 58-68.
[59] Friedrich List, *The National System of Political Economy*, Trans. by, Sampson S. Lloyd, 1909.
[60] Hermann Levy, *Industrial Germany, A Study of Its Monopoly Organisations and Their Control by the State*, 2001; Thorstein Veblen, *Imperial Germany and Industrial Revolution* 2003.
[61] Levy (note 60) 132, 134-139, 147.

housing etc., but the same government did not forget to pass anti-socialist legislation on 1878[62].

As a conclusive remark, I can express that welfare state was a comprehensive system of policies and measures which aimed reconciliation with masses via concessions to the working classes, stiffening the statecraft, social solidarity and becoming robust in international sphere. Welfare state transformed established nexus of the rule of law that it adjusted to a new political equilibrium and therefore judge-made law submerged under predominance of legislative acts. It must be renamed as "the substantive rule of law", of which substantive content of law surpassed the allocated tasks of liberal night watchman state. Normally, liberal countries, such as England and United States, accomplished welfare measures within regulatory bonds, but German tradition was a bit awkward that its *rechtsstaat* was more dynamic and constructive, which assumed an extra duty for national unification and modernisation, additional to the abovementioned commitments of the rule of law. German legal consciousness grounded on the unity between state and individual (as Jellinek says *Teutonic* consideration), which presumed an identity between the two poles, whereas Anglo-American approaches overtly or tacitly maintained the tension between civil society and state, inherited from liberal legacy[63]. Corollary of this idea, scope and purpose of the law in German consideration conferred legal character to the state and government that it equated legal and political actions, by which the identity of law subsequently equated with politics. Moreover, referring to the idea of nation or people, the law may avail ethical property, which adversary to the liberal idea whatsoever demarcated the domains of ethics and law. Under the normal course events, historicist approach to law and relying on its national trait is not totally unfamiliar to the origins of common law according to its piecemeal accomplishment in the Middle Ages, but it yielded serious consequences when coupled with mass society and equation law with politics. In this humbler space, I cannot dispute all constellations of the idea, but I must point that the tension between the liberal (procedural) rule of law and welfare state (i. e. the substantive rule of law) was mitigated when we consider the German

[62] Guenther Roth, *The Social Democrats in Imperial Germany: A Study in Working-Class Isolation and National Integration*, 1963, 35-36, 79-80, 139-150; George Steinmetz, *Regulating the Social: The Welfare State and Local Politics in Imperial Germany*, 1993, 41-55.

[63] Costa, (note 43) 94; Puchta, (note 9) 139-142 ; Alexander Freidlander, The Organism of Jurisprudence As A Science in Its Relations and Members, *Outlines of The Science of Jurisprudence*, Ed. and Trans by, W. Hastie, 150; Georg Jellinek, *The Declaration of the Rights of Man and of Citizen*, Trans. by, Max Farrand, 1901, 90-98. Herman Heller, The Essence and Structure of State, *Weimar, A Jurisprudence of Crisis*, Ed. by, Arthur J. Jacobson and Bernhard Schlink, Translated By Belinda Cooper with Peter C. Caldwell, Stephen Cloyd, David Dyzenhaus, Stephan Hemetsberger, Arthur J. Jacobson, and Bernhard Schlink, 2000, 264-278.

sozialrechtsstaat. Henceforth the latter inherently existed in the *rechtsstaat*, because both of them are considered as manifestation of the idea of the law[64].

IV. Globalisation and the Rule of Law

As regards history of civilization, from its very beginning from primitive societies, the twofold human spaces may be dichotomised that they were, firstly, centred on spatialisation of the known world by way of political power and territorializing it as outcome of non-market coercion and, secondly, re-spatialisation and territorialisation of world geography by way of market expansion under the economic power of capital, which wields peripheral locations, on behalf of monopoly companies[65]. Since, capitalism has an inherent predisposition to spread far-reaching market relations all over the globe, even where in some territories modes of production are not yet capitalist. The "globalisation" is relatively novel concept that it denotes globally working capitalism and its subsystems which depending on flow of goods, finance, technology, knowledge, territorial organisations and of business customs, the all those novelties are crosscutting the territory-bounded political bodies and nation-states[66]. Following to the unilateral circulation of capital anyhow determined by capital ownership, the globalisation opened a series of circulations which can be enumerated as material exchange (including trade, tenancy, wage-labour, fee-for-service and capital accumulation), power exchanges, symbolic exchanges (which is dissemination of cultural symbols and information), arrangement of localities (which determined by global flow), unravelling the established local arrangements and political centres at the expense of centralism in politics and culture which are totally stimulated by unintentional working of capitalism[67]. Albeit his some benevolent ideas on the globalisation, Anthony Giddens fairly determined four dimensions in the globalisation process that they comprised capitalist world economy, international division of labour, military order of the world and the system of nation states[68]. It seems that capitalist world economy predetermined scope and depth of globalisation. As Wallerstein denoted, globalisation is a specific form of worldwide networks of civilisations which divides world

[64] See, Otto Kirchheimer, The Rechtsstaat as *Magic Wall, The Critical Spirit, Essays in Honour of Herbert Marcuse*, Ed. by, Kurt H. Wolff and Barrington Moore, 1967, 287-312; Franz Neumann, *The Rule of Law*, Foreword by, Martin Jay, Introduction by, Matthias Ruette, 1986, 179-181; Franz L. Neumann, The Change in the Function of Law in Modern Society (1937), *The Rule of Law Under Siege*, Ed. by., William E. Scheuerman, 1996, 101-141.
[65] See, David Harvey, *Spaces of Capital*,2001, p. 237.
[66] Michael Storper, Globalization and Institutions of Economic Development, *Spaces of Globalization: Reasserting the Power of the Local*, Ed. by, Kevin R. Cox, 1997, 32-34.
[67] Malcolm Waters, *Globalisation*, 2001, 18-20.
[68] Anthony Giddens, *The Consequences of Modernity*, 1990.

empires and capitalist world economy, hereby both of them embodies non-egalitarian relations between centres and peripheries[69].

Today, when we talk about the globalisation, we indicate international market, networked relations and economy-based hierarchies of post-soviet era. Thus, it is last epoch of globalisations which was interpreted as submerging into different eras. Among others, Therborn hypothesised six waves of succeeding globalisations that they comprise all history of civilisations: (1) Diffusion of religions and transcontinental civilizations, whereby key factor of process was domination of imperial bodies; (2) European colonialism, after 1492 which demarcated with mercantile interests and colonial plunder; (3) Global thrust resulting from intra-European power struggles which distinguished with succession wars and Franco British wars in 18th Century, which culminated with Napoleonic Wars until 1815; (4) The age of trans-oceanic bulk trade and mass immigration until 1918; (5) shrinking of world trade after First World War which was a diverse wave as de-globalisation (whereby, abandonment of gold standard in currency and division of first and second worlds); (6) The current era which began with end of the cold war (the decay of socialist system must be added)[70]. The first wave remarkably differs from others that it depended on political domination unto economic resources of agricultural mode of production, but, at the last resort, its extension was determined fecundity of the geography, which only limited by technical and administrative capabilities of the age. The other waves are direct outcomes of capital ownership which in the milieu, either primeval accumulation of capital or exigencies of capital ownership on behalf of the centred zones of capitalism or at the expense of periphery countries, i. e., colonies or dependent regions.

The globalisation is determined by market relationship and expansionary nature of capitalist mode of production, even where it is disputed with denoting cultural consequences or other aspects that they remould cultures through destruction of local and global dichotomy or to unsettle pre-established time and space relations. The fact that the last wave of globalisation, how, at present, we plainly say "the globalisation", was embarked upon at the end of dissolution of socialist world. It seems triumph of liberalism that it disentangled capitalism from the non-market retraints in expansion of actual markets or to recuperate new markets already outer to the capitalist control. Therefore, the globalisation is outcome of an impersonal victor and that, apart from decisions of policymakers in the global market; it works as dehumanised manner and *in toto* devoid of forecasting an itinerary. In this context,

[69] See, Immanuel Wallerstein, *Historical Capitalism*, 1983.
[70] Goran Therborn, Glabalizations-Dimensions, Historical Waves, Regional Effects, Normative Governance, *International Sociology*, 15 (2000), 158-163.

we can frankly say that the globalisation is outcome of hyper-developed capitalism whatsoever is unintentional and uncontrollable, whatsoever cannot be humanised. During the era of welfare state since last quarter of 19th century up to 1980's, liberal ideology submerged beneath the welfare state that it was dormant, but not being deserted. Furthermore, some liberal partisans eventually warmed up it, in order to not desert it to oblivion or obsolescence. Von Mises, celebrated Austrian liberal, frankly defended 19th century type liberalism on 1927 who alleged that liberalism is only viable ideology of capitalism, in lock, stock and barrel and of its admonitions must be pursued for economy[71]. Similarly, Hayek radically raised his objections to all social justice measures and planned economy, as detrimental point of view favouring the classical liberalism, when shortly after the well-known "Beveridge Report" issued on 1942, whereby he alleged similarity between the welfare state and slavery[72]. We must add that Milton Friedman (on 1962) or Henry Hazlitt (on 1989)[73] preached similar liberal precepts, to the degree to which flattering taxpayer entrepreneurs, promising devastation of social justice and preaching shrinking government and deregulation. Despite the fact that welfare state or *sozialrechtsstaat* was not only means of sum total of the social justice but also recourse in the great depression in order to surmount shortage of demand, according to the Keynesian doctrine in spite of liberalism staked out American political ideology. I can lastly say that the globalisation, as ideology, is outcome of insurmountable stage of liberalism (i. e., neo-liberalism), whereby radical liberalism was initial ideology of American big business, therefore it factually coerced to the globe (to satellite states and others) when its main adversary (the socialist bloc) dramatically faded away.

Nonetheless the comprehensiveness of contemporary legal domain and its constellations, which rooted to the popular approval and democracy, capitalism, as leitmotif of the globalisation, determines outer limits of power allocation, whether in legal or political domains. Apart from the ongoing experience of legal history through the liberal rule of law and substantive development of the welfare state engraved our legal imagination, the legal system and judiciary of any capitalist country in contemporary world are not fully autonomous from those outer limits of power, emanated from economic base. Albeit his interpretation on the three period of globalisation is partially different my state of mind, Duncan Kennedy marvellously summarised components of legal domain very likely to the unilineal evolution conception of 19th century[74], but his legal development, which responsive

[71] Ludwig von Mises, *Liberalism in the Classical Tradition*, Trans. by, Ralph Raico, 1985.
[72] F. A. Hayek, *The Road to Serfdom*, 2001, 75-90.
[73] Milton Friedman, *Capitalism and Freedom*, 1982; 27-33. Henry Hazlitt, *Man vs. the Welfare State,* 1970.
[74] See, Duncan Kennedy, Two Globalisations of Law and Legal Thought, *Suffolk University Law Review*, 36 (2003), 631-679.

to the human exigencies, is not incessant. Whereas the constituents of first (between 1850-1914) and second (between 1900-1968) periods, which roughly correspond with the liberal and substantive rule of law development, refer the route of advancement with respecting human exigencies, human dignity and democratisation, but third stage, which annexed to the end of the article, mystifies the deterioration of vested rights of subaltern social strata. Anyhow, we can match miscellaneous components of the legal system, whereby attaching their origins to some historical periods, but we must take together comprehensive life of society under the light of crucial aspects when we debate the rule of law problem. Therefore, I intend to take seriously merit or demerit of its some essential aspects under a few numbers of headings.

1.The quintessence of the neo-liberal rule of law

The dominant legal purview of the globalisation is being expressed by the neo-liberal thinkers in legal or non-legal occasions that they revisit to the canon of classical liberalism. F. A. Hayek is conspicuous author of the neo-liberal legal imagination that he considers society according to his social Darwinist stance. To the extent to which concerned, Hayek disregarded public concern, favoured recalcitrant individualism, whereof he equated *nomos* and judge-made law, as a recourse for safeguarding individual, property and freedom of contract, whereas he was overtly reluctant for legislation (which he said *thesis*) when especially favoured to the working class and claims for social justice[75]. In the same way, but more radicalised version of neo-liberal point of view is belonging to Richard Posner who avowedly preached anarchical liberalism for the sake of commutative justice. He revisited Benthamite pain and pleasure dichotomy, but, in more radicalised form that he alleged "wealth maximisation" of individual instead of Benthamite principle on maximal happiness of greatest number of people[76]. Corollary of this idea, transaction became main lever of justice (i. e. commutative and corrective justices) in the manner how there is no room for non-market goods and public services. Posner's legal ideology is depending on eulogising "efficiency" (as borrowed conception from microeconomics), classical common law system (which indifferent to distributive justice and social justice) and shrunk government *vis-à-vis* to the liberal politics. Posner's minimal government is probably more shrunken than precepts for night watchman state arguments of the Adam Smith's liberalism. Therefore he proposes political institutions of the heroic age of Greeks, that's monarchical system which thinly balanced as separation of powers between *basileus* (king), *boule* (association of peerage) in the social

[75] F. A. Hayek, *Law, Legislation and Liberty*, Vol. I, 1977, 59-72-124.
[76] Cf., Richard A. Posner, *The Economics of Justice*, 1983 49.

milieu of citizenship of household (*oikos*) headmen[77]. Posner's point of view is not unprecedented, but cordially expressed with flattering veneration to property owners that his political bias is entrenched with legal assessment through impartial legal concepts. Brennan and Buchannan urged similar conception in the economic and politico-legal domains that they relied on Wicksellian idea in economy which set forth all economic decisions might depend on unanimity. Therefore, according to the Buchannan, any decision, legal or political, when concerned to economy, can only be viable according to the unanimity of all actors of economic transactions[78]. In other words, to the extent to which the question at pose concerned to democracy, any deliberation, political discretion and legal ruling should be repelled when thwarts the non-electoral constraints of economic transactions and property owners; that is, any legal ruling or political discretion can be viable if, only if it conforms the will of all individual property owners, unanimously.

2. Rule of investors, instead of the rule of law

Having been put forward many times, capital circulation in trans-border regions, transnational area or boundless on the globe is not entirely anew phenomena, that is inherent propensity of capitalism, notwithstanding it was fully disclosed after 1980[79]. The proponents of free trade policies had been fully cognisant of such phenomena since 19th century Manchester School, but some restraints curbed or fully dispelled such attitude, as consequences of the world wars and proletarian or national revolutions. When the United States of America mandated to establish the new system of currency at the of Second World War on 1944 via Bretton Woods agreement, 44 national governments recognised United States currency in order to adjust their national currencies. The system established together with regulatory institutions and rules of conduct which were International Monetary Fund (IMF), World Bank and The General Agreement on Tariffs and Trade (GATT); whereby the system prevented protectionism, trade barriers and dumping (the related anti-dumping code enacted on 1967). The system was trimming the United States hegemony in the world economy, but concealed its spirit with constraints of Keynesian policy and that it could not be matured under the impediments of the socialist bloc, anti-colonialist upsurge and non-alignment movement after Bandung Conference on 1955. The Bretton Woods System was incurred some convulsions and that it was relinquished on 1970 by the United States, the principal founder, but organisational

[77] Posner (note 76) 135-141.
[78] Geoffrey Brennan and James M. Buchannan, *The Power to Tax*, 2000 Ch I and II.
[79] See, John H. Jackson and Alan O. Sykes, Introduction and Overview, *Implementing The Uruguay Round*, Ed. by, John H. Jackson and Alan O. Sykes, 1997, 1-21. Errol Mendes and Mehmet Ozay, *Global Governance, Economy and Law: Waiting for Justice*, 2003.

umbrella remained and regulations were not deserted. However, the system could not entirely achieve the purpose of its founder; it paved the way for monopoly control of world economy. In this milieu a series of transnational organisations were founded, among which Benelux Union on 1948 or European Union (with Maastricht Treaty on 1992), after initial step with Paris Treaty on 1950[80].

Inasmuch as I conceive, the United States had planned to master world economy and politics when Bretton Woods conference summoned. Albeit the main idea of her initial plan, it failed with demerit of counter effects which were mainly political outcome of existence of the socialist bloc, political achievement of the third world countries, oil prices and economic recession in 1970's. In this milieu, neo-liberalism was seeming indispensable recourse in order to throw away economic recession[81]. By the way, several countervailing political dynamics were in decay that on the one hand working class movement and opposition of leftist political parties dramatically faltered, on the other hand the United States mastered some *coup d'état*'s in 1970's and at the eve of 1980's in various important peripheral countries in order to impose them neo-liberal policies or pushed some others to liberalism. Meanwhile, notwithstanding her political discourse ostensibly hinged on democracy, the United States preferred to establish close relationships with undemocratic governments *apropos* of reserved attitude of neo-liberal writers about democracy[82]. The fact that in the same period there were some signals which heralded fading away of socialist countries. Eventually, after a series of roundtables since 1963 up to 1979, which summoned by United States, the Uruguay Round in 1986-1993 yielded with establishment of the World Trade Organization (WTO) on 1995, the regulatory board for neo-liberal deregulation of world trade. The Uruguay Round settled miscellaneous issues of world trade, which embraced goods, services or agriculture sectors, intellectual property, tariff or non-tariff barriers, restraints on trade, abolition of dumping agreements and government subsidies. Subsequently, the WTO became representative of the GATT, furnished with a consensus rules and centralised dispute resolution board which backed with viable sanctions. Therefore, member states of the WTO and the GATT proclaimed their commitment to adjust national legal systems and that they would undertake to implement the agreements in their domestic legal systems. The guidelines hereafter is the agreements which are known as the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on

[80] See, Guglielmo Carchedi, *For Another Europe, A Class Analysis of European Integration*, 2001.
[81] Andrew Gamble, Neo-Liberalism, *Capital and Class,* 75 (2001), 127-138.
[82] Boetsch frankly alleged that "neo-liberal democracy" is an oxymoron, because democracy is not viable under unleashed freedom of capital investors. See, Lepoldo Rodriguez Boetsch, Neoliberalism and Democracy, *Privredna Izgradnja,* 48 (2005), 17-30.

Textiles and Clothing, the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures, the Agreement on Implementation of Article VI (Anti-Dumping), the Agreement on Rules of Origin, the Agreement on Subsidies and Countervailing Measures, the Agreement on Safeguards, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (including Trade in Counterfeit Goods) and lastly the Understanding on Rules and Procedures Governing the Settlement of Disputes. In addition, the Uruguay Round yielded a draft agreement, named as the Multilateral Agreement on Investment (MAI) which ultimately aimed to mandate deregulation and privatisation in national economies, that they are being considered as the elimination of all national regulations, emanated from Keynesian economic policy and the welfare state[83]. Today the MAI seems failed[84], but its logic resides in unleashed deregulation in the world trade.

The WTO system, by and large, is implementing regulatory (aiming deregulation) curb and enforcement mechanism of world trade that its commitments impaired constitutional and legal constraints of party states. Moreover there are other pervasive multilateral instruments which named as the "bilateral investment treaties" (BIT's) that those are previous from WTO system, but proliferated after 1989. As Schineiderman studied, he approximately detected 1700 BIT's on 2000 and 2500 on 2008, which may be more in today[85]. The BIT's are bilateral instruments aiming to implement foreign direct investment (FDI) that they are seemingly stipulating reciprocal rights and liabilities, as modelled like legal provisions of international treaties, but, in action, emanate *ex parte* immunities in favour of investors because of their overriding position. In this context, the BIT's curb constitutional and legal provisions of investment importing countries, by which they rule over laws and regulations of such countries which contain dispute resolution rules and agencies, and that they also enjoy GATS and other agreements of WTO. Schneiderman frankly expressed that the BIT's implemented constitution-like rules of investment which are indifferent to public welfare considerations of party states and their developmental achievements. Moreover, BIT's are very likely to the constitutions of capital owners, which are similar to the Buchannan's economic constitution, because constraining the future by way of taking provisions in order to safeguard investor

[83] David Schneiderman, Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-liberal Constitutionalism, *Law and Contemporary Problems*, 63 (2000), 99. See also, Gus Van Harten, Five Justifications for Investment Treaties: A Critical Discussion, *Trade, Law and Development*, 2 (2010), 19-58. See for MAI project's role in the world economy, Claudia von Werlhof, Globalization' and the 'Permanent' Process of 'Primitive Accumulation': the Example of MAI, the Multilateral Agreement on Investment, *Journal of World-Systems Research*, 6 (2000), 728-747.
[84] Mason (note 4), 124.
[85] See, Schneiderman, (note 83); David Schneiderman, *Constitutionalizing Economic Globalization*, 2008, 28.

against confiscation and nationalisation, even though the party states justly indemnify the cost of assets and other indemnities.

Schneiderman pointed that investment rules have constitutional character that they are backed by more vigorously than internal law. First of all, it seems that all member states of WTO and party states of BIT's voluntarily promised to implement stipulations which enacted in multilateral or bilateral agreements. Secondly, they are compelled to consent, because surrendered implementation of their development under the aegis of international business circles, probably by their irredeemable economic condition, ideological choice or corruption. Furthermore, another remarkable fact is that the underdeveloped or developing countries very radically carried on such rules of investment in their domestic legal systems by way of legislative revisions and constitutional amendments. Schneiderman also pointed that some Latin American countries (Colombia on 1991or Mexico 1994) legislated constitutional amendments to safeguard privatisation[86]. As an example, I can personally point my homeland country (The Republic of Turkey) where a constitutional amendment was annexed a provision to Section 47, on 1999 that it uphold privatisation of public assets. Examples may probably be proliferated, but most remarkable one is Slovenian Constitution of 1991, which broadly envisaged privatisation. Slovenia excessively perpetrated privatisation policy, unbelievably exceeding economic purposes that it reached privatisation of public security, intelligence, judicial execution and entirely judiciary[87].

Investment rules and privatisation, aforesaid, may be consented from point of view of liberal ideology of law, but their functioning destructive with regard to human condition in the global south. The globalisation very seriously deepened income inequality, as United Nations Development Programme disclosed on 1996 that purchasing power of 258 richest people in all over the world was equal to combined income of poorest 45 per cent of the world population which numbered as 2.3 billion people[88]. Apart from the globalisation extremely radicalised inequality between regions and social classes, as pointed by Werlhof, 500 biggest transnational (multinational) companies in the year 2000 were controlling 80 per cent of total investment all around the globe[89]. In the same way, after industrial property safeguarded, 39.000 firms were controlling 270.000 firms which totally valued as 2.7 trillion USD, almost

[86] Schneiderman (note 83).
[87] Bostjan Zalar, Privatization of State Coercive Authority: From Compact Back to Combat? *International Journal of the Sociology of Law*, 27 (1999), 317-334.
[88] Cited by, Zygmunt Bauman, On Glocalization: Or Globalization for Some, Localization for Some Others, *Thesis Eleven*, 54 (1998), 37-49. Jan Nederveen Pieterse, *Globalization or Empire*, 2004, 64.
[89] Werlhof, (note 83) p. 736.

all high-tech user firms on the globe[90]. There is a tremendous number of statistical evidence that they refer not only inhuman inequality between north and south or certain cleavage between life expectancy, but also global inequality is a decisive impediment for economic development of underdeveloped countries. By and large, overwhelming majority of lawyers are political liberals, anyhow indifferent to the economic issues, but they must notice that social order can no longer maintain in low life expectancy and carelessness to human dignity. Lastly, we remember the main characteristic of the rule of law that it featured as to limit political by way of checks and balance system on the legal ground. This main character upside down after the neo-liberal globalisation where centrifugal forces, the checking power of bourgeoisie became more powerful than governments, while democracy claims of working classes are more subtle than the last two centuries. When Evgeny Pashukanis, Soviet jurist, criticised bourgeois legal form with respecting commodity fetishism (of Marx) veiling to surplus value exploitation, he alleged that legal form is similarly veiling to bourgeois domination by means of ostensible autonomy of legal domain in capitalist society[91]. Despite we allege pros and cons justifications against legal outcomes of the globalisation, today not only the rule of law, but also condition of legal system, in general, is poorer than Pashukanis's criticisms.

3. Private lawmaking and undemocratic legal pluralism

The globalisation unleashed inherent inclination in the legal imagination of capital owners, whose intent is unbounded by law in his dealings or other commitments, except her or his matter-of-fact involvements or promises. The legal imagination of any individual capitalist incessantly dreams to release from government regulation and non-market constraints, such as national interest of his or her of own government or other governments, whatever compatible with inspiring shrunken government. After neo-liberalism, the capitalist imagination disentangled from all public policy concerns and political limitations where the new legal development yielded governance between corporate investors or their proxies in national or international level as outcome of deregulation policy, instead of democratic deliberation. In this milieu, we confront new type of legal domain that it comprises private lawmaking which named as *soft law* (in national or international sphere) or with more brilliant name *modern lex*

[90] Cf., John-Ren Chen, Foreign Direct Investment, International Financial Flows and Geography, *Foreign Direct Investment*, Ed. by, John-Ren Chen, 2000, 6-32.

[91] See, Evgeny Bronislavovich Pashukanis *Selected Writings on Marxism and Law*, Ed. by, Piers Beirne and Robert Sharlet, Trans. by, Peter B. Maggs, 1980, 273-301.

mercatoria[92]. Levit and Snyder separately delved into that private lawmaking take place among investors and capital owners that its main objective is regulating trade by means of privately made rules, in devoid of government regulation. National or international corporate bodies of capital flow are able to implement bottom-up rules of trade which concerned to the matters of their transaction in formal way they are unbounded by law or any constitutional limitation. The bottom-up rules are depending on experience and customs of market, as traditionally enunciated in the private international law, which ostensibly rely on wills of trading partners, but in practice it is taken place under superimposition of wills of mandating big business. Their softness is depending on matter-of-fact equilibrium that they cannot be put into limitation of the legal system of the country or may eventually deviate without any respect to formal principles and ground rules. In international level, the soft law means myriad international instruments[93], in practice, lacking formal properties of law, which are unpromising for implementing public disclosure, formality, accountability and predictability.

Private lawmaking is depending on a longer history than the last wave of globalisation. Apart from historical roots of the private international law, American business and finance industry, in general, were very arduous to institute private lawmaking according to classical liberal state of mind. We can find that NCCUSL (National Conference of Commissioners on Uniform State Laws) or, in other name, Uniform Law Commission is a kind of NGO which depending on remote past, as dated at 1892. The other non-government organisation is ALI (American Law Institute) is having been recorded that it implemented Uniform Sales Act on 1906[94]. Since 1906 the Institute prepared more than 200 laws on commercial transactions or investments and, as Snyder expressed, Uniform Commercial Code had been legislated as joint venture of the two organisations. Furthermore, the soft law comprises a number of legal instruments which enacted very few persons, cannot be deemed corporate bodies. Berne Union has been a kind of lobby of finance, since 1934 which has secrecy but regulated all credit insurance issues, summoned as likely gentlemen's dialogue[95]. Similarly, Visa and MasterCard, only the two companies regulate credit cards sector, whereas De Beers, the only one company, regulates diamond market according to the religious law of Jews. When we entirely regard international soft law, the development may be fairly interpreted according to

[92] Janet Koven Levit, A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments *The Yale Journal of International Law*, 30, (2005), 125-209; David V. Snyder, Private Lawmaking, *Ohio State Law Journal*, 64 (2003), 371-448.
[93] Levit, (note 92) 127, 132, 141.
[94] Snyder (note 92) 378-379.
[95] Levit, (note 92) 146.

deconstructive philosophy or in favour of other interpretative approaches[96], whereas the law is not the area for proliferation of philosophical or aesthetic ideas, moreover it must be in achievement to provide basic needs of humankind.

Tremendous number of legal scholars eulogise legal consequence of the globalisation with aspiring more humanitarian world which should have released from national bond, more freed and fitting to cosmopolitan ideal[97]. The dream is being prolonged to transnational world, but its guarantees are totally lacking, because there is no constraint to impose capital owner to behave in pursuance for public order, human dignity and welfare of all. The globalisation debates oscillate between inequality and democracy problems that nobody can propose a viable solution for both of them in the present state of affairs. Apart from its viability for monopoly capitalists, the international soft law is not only lacking public disclosure and democratic questionability or accountability, but also quiescent for eliminating poverty and inequality, notwithstanding that the effectivity of capital investment is vital for such a problem. Regarding to the inner relation between notorious (somebody think) "formalness" and the rule of law, adjudication was key element which safeguarded supremacy of law by way of public monopoly. On the contrary, emerging means of extra-legal mechanism of dispute resolution, which are exclusively stipulated in FDI rules or WTO agreements, radically divorced from public justice consideration, anyhow cannot controllable by appellate courts or even cannot be challenged before judiciary. Therefore, such mechanisms displace public character of legal domain that it cannot be deemed administrative of justice anyhow contrary to the entire legal experience of humankind. Consequentially, I can frankly express that the globalisation would be equated with decline of the rule of law; instead, it must be considered as governance between capital owners[98].

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[96] Cf., Gunther Teubner, The King's Many Bodies: the Self-deconstruction of Law's Hierarchy, *Law and Society Review*, 31 (1997), 763-787.

[97] Cf., Mendes and Ozay, (note 79) 298 *et seq*. Spencer Zifcak, Globalizing the Rule of Law, Rethinking Values and Reforming Institutions, *Globalisation and the Rule of Law*, Ed by, Spencer Zifcak, 2005, 32-36. Owing to the rule of law after globalisation, some important problems are remaining which are needed to be criticised, especially regarding to the international sphere and the soft law. The rule of law provides some indispensable conditions in legal theory and practice that it comprises universality, formality, generality, accountability which might be yielded as legal certainty and determinacy. In this milieu, judicial activism and legal realism are totally pernicious to the rule of law which are traditional in the American legal culture. Regarding to the two facets of transnational legal practice, on the one hand American arrogance in the international soft law which is depending on American character in the overwhelming majority of multinational companies and their influential position, on the other hand inevitable development of American type case-law in the international dispute resolution agencies whatsoever caused by lack of legal norms and shortages of international instrument in the milieu of incommensurable legal cultures of national legal systems. These are all maiming or aborting present or prospective institutions of the international rule of law, by way of uncertainty, indeterminacy and *ad hoc* sentencing. Cf., Brian Tamanaha, *Law, as a Means to End: Threat to the Rule of Law*, 2006; James R. Maxeiner, Some Realism about Legal Certainty in the Globalization of the Rule of Law, *Houston Journal of International Law*, 31 (2008), 27-46.

[98] Mason, (note 4) 127.

4. Political nexus of the rule of law is totally fading away

Regarding to the early development of the rule of law, it came into effect in certain political condition that it could be materialised in the national union and sovereign state which took place separation of powers with ubiquity of law in civic society. In this milieu, nation-state was the political context within which the rule of law developed that it was accompanied by civic virtues, citizenship of the state, republicanism and democratisation. In the meantime, the nation-state fused with political membership of citizen which relied on cultural homogenisation and re-established identity with due regard to civic life, at the expense of ethnic or religious community affiliations[99]. By the way, the liberal rule of law advanced in actual or taken for granted society of individuals where the social system seemed to have balanced according to the dichotomy of private and public spheres. As a matter of fact, when the society of individuals faded away, mass society was treated to control by way of disciplinary devices. By the same token, the society evolved to a new stage that it became scene of class conflict and democratisation claims. In this milieu, the national society remained, furthermore stiffened under the unease from warlike competition between states and plainly hostility among them. The globalisation in economy fairly impinged on nation-state[100], probably did not entirely abolish, but very seriously maimed when crosscut it by way of pushing to withdraw from discretion and adjudication in economy-related matters. Despite the fact that sovereign state was weakened by transnational companies and global governance of capitalism, it cannot be limited again by law, as having been reckoned in constitutional limitation by law or separation of powers[101]. It is apt to think that ultra-minimal government cannot bear a multiplied limitation by law or other countervailing political dynamics, which might be only arisen within national society. The foreseeable outcome is to sway dictatorial means of government when political situation become unmanageable.

The globalisation realigned structural components of capitalist society that they already seemed relatively stable, such as vocational and political roles of social groups, classes, localities or community affiliations. Apart from residual forms of pre-modern societal relations, capitalist society relocated structural components in market-based relations which manifested totally comprehensive system of markets in economy, hierarchies in politics and

[99] Bhikhu Parekh, Reconstituting the Modern State, *Transnational Democracy*, Ed.by, James Anderson, 2002, 39-55; Joe Painter, Multi-level citizenship, identity and regions in contemporary Europe Reconstituting the Modern State, *Transnational Democracy*, Ed. by, James Anderson, 2002, 94.

[100] Storper (note 66) 36.

[101] Caruso confers state-making role to the private law with respecting private law logic of liberalism, but she cannot convince reader about how public sphere and citizenship. The point of view indicated to the unleashed resilience of capital owners that it may only incite global power of imperial order of capitalism. Cf., Daniela Caruso, Private Law and State-Making in the Age of Globalization, *International Law and Politics*, 39 (2006), 2-74.

administration and networks of vocational or social relations[102]. The globalisation is primarily economy based phenomena, but decomposed all beforehand social settings, therefore changed it toward anew spatial relations. The globalisation does not exert a blue print model of society for all societies and relational categories, in modes of production, consumer behaviour, politics and recreation that it caused spatialisation which partially adjusted to common crossroad of role attachment and relational place of social settings. Whereas, the capitalist firm in the classical liberalism age was subjecting territorial sovereignty of state that it was conditioned by political role of government, it pledged to safeguard capital in an impartial involvement and legal restriction, according to the ideological orbit of the liberalism. A capitalist or an investor was therefore liable to the certain legal requirements of the rule of law which ubiquitously postulated in constitutional system. On the contrary, in the age of monopoly capitalism, state was fettered by the interests of the capitalist investor which gradually pushed state to confer his inclusion to governmental discretion, as considering the identity between interest of nation and monopoly firms.

The globalisation of present epoch has relocated the order of things that governance between monopoly capitalist companies and government has been transformed to worldwide governance between companies, governments and their organisational umbrella, as having been instigated by WTO or World Bank. Indeed, those states are not equal in the milieu of disproportionate regionalisation of homelands of capital concentration which is obvious when we glance at geographical location of their headquarters and central organs of companies. In the same way, global policy concerns are shared in a congruent pattern under supremacy of company headquarters which subsequently denote unequal regionalisation on behalf of developed countries of the global north[103]. The globalisation opened a way to re-establish spatial involvements of firms that it surpasses previous spaces of political geography. This relocation means reallocation of spaces and localities, as named spatialisation that it seriously rearticulates centre and periphery relations. By the way, spatialisation is not plainly redistribution of geography or as pointed by Swyngedouw, spatiality denotes geographical scale which "perpetually redefined, contested and restructured in terms of their extent, content, relative importance and interrelations"[104]. Such spatialisation is ability to create new localities or impair for own part of abler to do that it means ability to annul limitations of

[102] See all precise essays in this book. Grahame Thompson, *et al*, eds., *Markets, Hierarchies and Networks, The Coordination of Social Life*, 1996.
[103] See, Paul Hirst and Grahame Thompson, *Globalization in Question*, 1999. Michael Nollert, Transnational Corporate Ties: A Synopsis of Theories and Empirical Findings, *Journal of World-Systems Researches*, 11 (2005), 289-314.
[104] Erik Swyngedouw, Neither Global nor Local: "Glocalization" and the Politics of Scale, *Spaces of Globalization: Reasserting the Power of the Local*, Ed. by, Kevin R. Cox, 1997, 141

space, therefore new localities are rescaled according to the unintentional route of the globalisation, whereof local is renamed with a coined term of "glocal"[105]. Global firms and financial flow localised globe according to the market opportunities, reliability to the labour force, sources of raw materials and prospective clients or shareholders whereby their managerial staffs are very likely plenipotentiary *cadré* on behalf of investors, henceforth, not equally treating their metropolises with subordinate localities[106]. Taken together the WTO system, the BIT's, FDI commitments and unequal distribution of wealth, as Werlhof pointed, the new world order manifests itself as an awkward model of colonisation that it has only one difference with old colonialism whereby this time, colonies are localities and belonging to transnational companies[107]. In this milieu, legal systems of the territorial states seems very likely to the environmental factor that they are burdens or negotiable impediments from the point of view of samurai-like *ceo*'s or authorized *cadré*'s of 37.000 transnational companies[108].

Lastly, we must glance at political prospects about how viability of the system in national and international spheres. The globalisation aroused in a certain political context that to some extent it was already imbued with outcomes of centennial experience of democratisation and certain degree of *polyarchy* anyhow. The fact that political indifference grew up after 1950's in the western countries, as some political scientists alleged or observed in decayed political strife of working classes, but their vested rights were remaining. As regards, territorial states were maiming after new economic spatialisation, there was similar process in politics that political groups were reshaped according to new spaces and their networks. It is obvious that

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[105] Bauman, (note 88) 42-45. Robertson points that "glocal" coined first time in the Japan business jargon which denoted market opportunities and requirements, as reflected trade policy of micromarketing. See, Roland Robertson, Glocalization: Time-Space and Homogenity and Heterogenity, *Global Modernities*, Ed. by, Mike Featherstone, Scot Lash and Roland Robertson, 1995, 28.

[106] Meric S. Gertler, Between The Global and the Local: The Spatial Limits to Productive Capital, *Spaces of Globalization: Reasserting the Power of the Local,* Ed. by, Kevin R. Cox, 1997; 45-63; Andrew Mair, From Multinational Enterprise to Postnational Enterprise?, *Spaces of Globalization: Reasserting the Power of the Local,* Ed. by, Kevin R. Cox, 1997, 64-88; Gordon L. Clark and Kevin O'Connor, The Informational Content of Financial Products and the Spatial Structure of the Global Finance Industry," *Spaces of Globalization: Reasserting the Power of the Local,* Ed. by, Kevin R. Cox, 1997, 89-114.

[107] See, Werlhof (note 83).

[108] Barbara Emadi-Coffin, *Rethinking International Organization: Deregulation and Global Governance*, 2002; Susan Roberts, Global Strategic Vision Managing the World, *Globalization under Construction: Governmentality, Law, and Identity*, Ed. by, Bill Maurer and Richard Warren Perry, 2003, 1-37. A more recent research demonstrates that the Orbis 2007 database of OECD contained 43060 transnational companies in 194 countries (among which 5675 out of the number are quoted in stock markets), whereas the universe (total number) includes 37 million economic actors. In this milieu the researchers calculated 600508 economic entities and 1006987 corporate relations that they networked by way of direct or indirect ownership, shareholder model or participated company, in which a large portion of control flows to a small tightly-knit core of financial institutions. See, Stefania Vitali, James B. Glattfelder and Stefano Battiston, The Network of Global Corporate Control, PLoS ONE 6(10): e25995. doi:10.1371/journal.pone.0025995.
(Online, http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0025995)

politics, as a super-structure component, nurture from certain cultural patterns, milieus and ideological achievement which are totally surrounding by culture. Capitalism used to be a very privileged social formation before the globalisation which was capable of proliferating ideological articulation both of beneficial to dominant politics or its foes. Conversely, cultural aspect of the globalisation is totally curbed by consumerism and corporate culture of business which manifests passive reformism, hybrid or barren social achievements and indifference to the revolutionary ideas. When the globalisation stimulated glocal scales, it maintained as revoking national traits of territory based culture, whereby revitalisation of communities and community based cultural networks. Those cultural milieus aim to embody daily concerns of communal aggregations, but not represent vintage point of view of constituents', because they are reflecting hybridisations or *mélanges* which engendered under supremacy of the gist of global culture (i. e. cultural imperialism)[109]

All previous democracy experience depended on territoriality of politics, whereby democracy was accomplished within inclusive space of political society, therefore to the extent to which democratisation took place, it was a national achievement. After the globalisation, on the one hand, private sphere colonised public sphere as consequential outcome of invincible monopoly capital, on the other hand, subaltern political groupings or quasi-groups of identity politics arouse detrimental to the territoriality and national culture of states. In this milieu, identity politics and participatory democracy are exciting ideas instead of representative democracy and deliberation in nation-based society, where small size political interest groups and their NGO based unions are emerging[110]. Moreover, NGO's and subaltern political actors are in the grey area at somewhere between public and private spheres[111], but networked in transnational space with states, international organisations and transnational companies indiscriminately, disregarding policies of their own governments. At the first glance, it seems that democracy extended with expanding NGO's and unfettered from

[109] Jan Nederveen Pieterse, Globalisation as Hybridization, *Global Modernities*, Ed. by, Mike Featherstone, Scot Lash and Roland Robertson, 1995, 49. Cultural imperialism thesis is belonging to Robertson. See (note 105) 37-40.

[110] James Anderson, Questions of Democracy, Territoriality and Globalisation, *Transnational Democracy*, Ed.by, James Anderson, 2002, 6-38. The situation is more deteriorated in the former colonies where ethnicities are real impediments of national unification and public sphere. See, James Ferguson and Akhil Gupta, Spatializing States: Toward an Ethnography of Neoliberal Governmentality, *American Ethnologist*, 29 (2002), 981-1002.

[111] Joachim Hirsch, The Democratic Potential of Non-governmental Organisations, *Transnational Democracy*, Ed.by, James Anderson, 2002, 195-214. Some authors presume anew public sphere is developing, as so-called "global civil society" to the extent that its leitmotif is transnational governance which composed by corporate business, NGO's and transnational organisations. Despite corporate interests of transnational business is predominant, there is any lever to stimulate such public formation, except mass media which were already determined by capital ownership, closely merged with transnational capital. Cf., for example, Manuel Castells, The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance, *The Annals of the American Academy of Political and Social Science*, 616 (2008), 78-93.

formal bounds of constitutionalism, but it is not true for two respects. Firstly, political participation through NGO's is unreliable and vulnerable, thereby aimed only bargaining as powerless partners before insuperable counterparts that they are normally summoned by chance or arbitrariness of powerful agencies. Secondly, NGO's and communitarian subaltern groups are representing a political hiatus which are only capable to a certain type of deliberation, that is their political concern cannot embrace nationwide issues, instead they are concerned with only communal aims, because of their *raison d'être* is only depending on diversity within the general rest of society and in the vicious circle of hybridisation. Subsequently, contrary to their vociferous campaigns, NGO's are neither capable to hand essential problems of society, nor participate any robust deliberation for the future of society, which can only capable for murmuring in the long term and impinge procedural guarantees of the rule of law. NGO's contribute constellation of global networks[112], but not democracy, because that the *demos* has been relying on citizenship and territoriality since Cleisthenes reforms, maintained with abnegation community affiliations. In this milieu, present forms of participatory democracy declining in everywhere or it means "democracy without *demos*", whereof cannot achieve to replenish the rule of law.

V. Conclusions

There is a presumed interrelation between autonomy of law and its expansion all miscellaneous aspect of the social life in modern society where freedoms of individual and comprehensiveness of legal system are contingent, but supposedly balanced in the long run. Corollary of those ideas, the rule of law problem covers all inclusive social relations which cannot be limited by relationships between law and fundamental institutions of economy and politics. In the same way, the rule of law after globalisation inherently juxtaposes the same aspects, but, in this paper, I preferred to suffice with criticism on the core problem which limited by fundamental nexus of the rule of law. There are remaining headings which are being researched and worthwhile to devote more labour that they, at least, include grave human rights violations to war prisoners in Guantanamo or elsewhere after 11th September, abolition of international law which perpetrated by the United States against in Iraq and subsequent so-called "the Arab Spring", the rule of law is being overridden by way policing in national and transnational spheres, the enemy criminal law, enhancing discrimination and maltreatment to immigrant workers, foreign nationals and asylum seekers and paralysis in international organisations in issues concerned other than transnational capital. All of the

[112] See, Peter J. Taylor, "Relocating the Demos?," *Transnational Democracy*, Ed. by, James Anderson, 2002, 236-244.

prospective headings denote inexorable deficiencies of the contemporary world which seem not to be repaired in the short run.

The rule of law is politico-legal domain that it stipulates legitimacy of political power by way of anchoring law whatsoever restricts political and administrative discretion. Despite the fact that some differences can be delineated according to national experiences of the rule of law, it can only be viable when some number of constraints safeguard it, whatsoever may rely on constitution, political equilibrium and other structural basements of legal system, very likely to the structural components of society. In this context, the rule of law is *status quo* in itself, which is due to equilibrium between law and politics under primacy of judiciary. Historically, the rule of law began with judge made law, which viable in the liberal society, and installed to the democratisation of mass society with relocation legislative means and entrenchment to the legal corpus, as having been seen in the welfare state. After the globalisation, political basement of the rule of law was faded away, where politico-legal domain is incrementally transmuting to plutocracy; therefore there is no room for the rule of law, neither democracy.

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